Filed 6/30/16 Khanna v. Sonasoft Corp. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VINCE KHANNA, Plaintiff and Respondent, v. SONASOFT CORPORATION et al., Defendants and Appellants.	H041128 (Santa Clara County Super. Ct. No. 1-06-CV-074362)

Sonasoft Corporation and Andy Khanna (Andy) (together appellants) challenge an order after judgment, filed on June 9, 2014, granting a motion to strike brought by respondent Vince Khanna (the June 9, 2014 order).[1] That order struck particular exhibits attached to Andy's supplemental declaration, filed March 20, 2014, (the declaration) and references to those exhibits in the declaration.

In their opening brief, appellants assert that the June 9, 2014 order is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(2).[2] We asked the parties to submit supplemental briefing discussing whether the order was appealable or whether this court must dismiss the appeal because the order was not appealable.

We conclude that this appeal must be dismissed.

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[1] Apparently, although they have the same surname, Andy and respondent are not related.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

I

Procedural Background

The caption of the declaration indicated that it was filed in support of appellants' reply in support of their motion for a stay of enforcement proceedings pending appeal (motion to stay) in *Khanna v. Sonasoft Corporation et al.* (case No. H040007).[3] In their reply, also filed March 20, 2014, appellants characterized respondent's enforcement efforts as abusive, and they asked the court "to enforce the mandatory stay provided by Code of Civil Procedure section 916 . . . ." The appellate record[4] does not appear to contain appellants' notice of motion and motion to stay, respondent's motion to strike particular exhibits attached to the declaration and references to those exhibits in the declaration, or the trial court's written ruling on appellants' motion to stay.

At the April 24, 2014 hearing on appellants' motion to stay and respondent's motion to strike, the trial court indicated that settlement discussions were privileged. The trial court indicated that it would decide the motion on the facts and the law, and it did not want to know anything about what the parties were doing behind the scenes to settle the case. The trial court stated, "So I'm going to grant the motion to strike." Respondent's counsel stated that he would prepare an order. As to the motion to stay, the trial court indicated that appellants would need to post a bond or undertaking. It directed respondent's counsel to prepare the order.

The June 9, 2014 order, which was prepared by respondent's counsel, specified that particular exhibits attached to the declaration were inadmissible under Evidence

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[3] On our own motion, this court ordered this appeal to be considered together with case No. H040007) for purposes of briefing, oral argument, and decision. On our own motion, we take judicial notice of the appellate record in case No. H040007 and the "Supplemental Declaration of Andy Khana ISO Defendants' Reply in Support of Motion for Stay of Enforcement Proceedings Pending Appeal," filed in Santa Clara County Superior Court Case No. 106CV074362 on March 20, 2014. (Evid. Code, §§ 452, subd. (d), 459.)

[4] The parties proceeded by way of appendices.

Code section 1152, and it struck them "from the record." The order also struck the references to those exhibits in the declaration "from the record."

In a November 2014 order, the trial court granted Andy's motion to stay collection proceedings, noting that "[c]ollection proceedings were stayed and remain stayed since August 20, 2014 when the bond was posted."

II

Discussion

Section 904.1 allows an appeal from "an order made after a judgment made appealable by paragraph (1)" of subdivision (a) of the section. With an exception not here relevant, subdivision (a)(1) of section 904.1 generally authorizes appeals from final judgments. (See Black's Law Dict. (10th ed. 2014) p. 938 [defining "interlocutory"].)

"Despite the inclusive language of Code of Civil Procedure section 904.1, subdivision (b), not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651, fn. omitted (*Lakin*).) First, "the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. [Citation.]" (*Ibid*.) Second, " 'the order must either affect the judgment or relate to it by enforcing it or staying its execution.' (*Olson v. Cory* (1983) 35 Cal.3d 390, 400 (*Olson*).) Under this rule, a postjudgment order that does 'not affect the judgment or relate to its enforcement [is] not appealable . . . .' (*Ibid*.)" (*Id*. at pp. 651-652.) Postjudgment orders that do not affect the judgment or relate to its enforcement may be "more accurately understood as being preliminary to a later judgment, at which time they will become ripe for appeal." (*Id*. at p. 652.)

Appellants concede that the June 9, 2014 order "does not work to enforce or stay execution" of the judgment.[5] But they argue that it affected the judgment.

The parties apparently understand the June 9, 2014 order as mandating the retroactive deletion of all copies of the documents contained in the stricken exhibits from the entire superior court file wherever they appear. Their interpretation of the June 9, 2014 order is nonsensical since evidentiary objections are waived if not timely interposed (Evid. Code, § 353), appellate courts review the correctness of a judgment or order as of the time of its rendition based upon a record of what was before the court for its consideration (*In re Zeth S.* (2003) 31 Cal.4th 396, 405), and "[a]ll exhibits admitted in evidence, refused, or lodged are deemed part of the record . . . ." (Cal. Rules of Court, rule 8.124(b)(4).)

Furthermore, appellants have not provided this court with a record establishing that respondent's motion to strike asked the court to retroactively delete all copies of the documents contained in particular exhibits to which respondent was objecting wherever they appeared in the superior court file or that the court's objective in granting the motion to strike was to do so. Rather, it appears from the limited record before us that the June 9, 2014 order was preliminary to a ruling on appellants' motion to stay and its effect was simply to remove the stricken exhibits, and the declaration's references thereto, from the court's consideration in ruling on appellants' motion to stay. Appellants have not demonstrated that the June 9, 2014 order affects the judgment or relates to its enforcement.

While the June 9, 2014 order presumably would have been reviewable if the trial court denied appellants' motion to stay and appellants appealed from such order, the June 9, 2014 order was not an appealable postjudgment order. (See §§ 904.1, subd. (a)(2), 906; *Lakin*, *supra*, 6 Cal.4th at pp. 651-652; see also *Roden v.*

[5] A second amended judgment was filed September 24, 2013.

AmerisourceBergen Corp. (2005) 130 Cal.App.4th 211, 218 [postjudgment discovery order not appealable because it was preliminary to further proceedings].)

"The existence of an appealable judgment [or order] is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1. [Citations.]" (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126-127.) " 'An attempt to appeal from a nonappealable order does not give this court jurisdiction or authority to review it.' (*Sherman v. Standard Mines, Co.* (1913) 166 Cal. 524, 525.) Consequently, it is the duty of the court to dismiss an appeal from an order that is not appealable. (*Collins v. Corse* (1936) 8 Cal.2d 123, 124.)" (*Doe v. United States Swimming, Inc*. (2011) 200 Cal.App.4th 1424, 1432.)

Appellants urge us to treat their appeal as a petition for an extraordinary writ if we find the June 9, 2014 order is not an appealable order. The power to treat a purported appeal from a nonappealable order as a petition for writ of mandate should not be exercised except under unusual circumstances. (*Olson*, *supra*, 35 Cal.3d at p. 401.) This case does not present such circumstances, and we decline to treat the improper appeal as a writ petition.

DISPOSITION

The appeal is dismissed. The parties shall bear their own costs.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P.J.

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MIHARA, J.

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